WEI TAH CONSTRUCTION (B.) CO. SDN. BHD. & ANOR. v. LAW WUN ING

[O.C.J. (Yusoff Mohamed J.) January 16, 1980]
[Kuching — Civil Suit No. K. 230 of 1974]

Contract — Land transfer — Representation — Land alleged to be "near the airport at Sibu" — Land found to be 8 or 9 miles away from Sibu airport — Whether "mistake" — "Patent defect" which could be investigated — Claim failed.

The present claim involved the first plaintiff and the defendants. The first plaintiff owned a house and land in Kuching North Land district. The first defendant was the owner of a land at Sibu. The second defendant was the husband of the first defendant.

On February 14, 1974, two brokers met the plaintiff. They wanted to buy his house and at the same time, they wanted to sell him a piece of land described to him as "near the airport at Sibu." The price was $75,000. On February 15, 1974 the brokers returned with one Siew who offered to buy the Sibu land for $94,000. Subsequently the plaintiff met the first defendant who agreed to buy the plaintiff's house at $38,000 (from the proceeds from the sale of her Sibu land to the plaintiff). The plaintiff then instructed his solicitor to make a search on the title to the Sibu land. An agreement was also made between the plaintiff and Siew in which the latter agreed to purchase the Sibu land at the price of $94,000. On February 16, 1974 the plaintiff instructed his solicitor to prepare the document of transfer of the Sibu land to him after, he said, the first defendant had assured him that the land was 'near the Sibu airport'. He also instructed the solicitor to prepare another document transferring his house to the first defendant. Both transfers were completed and executed and payment of $37,000 was made to the first defendant. Siew, however, never appeared to take the transfer of the Sibu land. The plaintiff, on the other hand, discovered subsequently that the land was 8 to 9 miles away from the Sibu airport.

The issue before the court was whether the plaintiff had acted on the alleged misrepresentation when he decided to buy the Sibu land.

Held, dismissing the plaintiff's claim: (1) there was no representation in any way made by the first or second defendant at the stage of negotiation which induced the plaintiff to purchase the Sibu land;

(2) even assuming that the plaintiff relied on the description of the land as "near Sibu airport" which induced him to purchase it, it was apparent from the evidence that he was not misled by that statement; the plaintiff had earlier instructed his solicitor to investigate that title and in consequence of this investigation he was advised that the Sibu land was a good buy;

(3) the defect which the plaintiff sought to rely was a patent defect of quality of the land he purchased which was discoverable by inspection and ordinary vigilance on the part of the purchaser;

(4) the plaintiff in this case had chosen not to inspect the land before executing the transfer with the first defendant in view of his other considerations in making a quick profit and in this regard he could not complain on discovering the defects after his venture with Siew had failed;

(5) based on the same facts, the first defendant's counterclaim should succeed and the transfer of the house and land in North Land District be effected in favour of the first defendant.

Cases referred to:-

(1) *Holmes* v. *Jones* (1907) 4 C.L.R. 1692 @ 1702.
(2) *Redgrave* v. *Hurd* (1881) 20 Ch. D. 1.
(3) *Svanosio* v. *McNamara & Anor.* (1956-57) 96 C.L.R. 186 @ 207.

CIVIL SUIT.

Patrick Tan for the plaintiff.

Nicholas Tang for the defendants.

Cur. Adv. Vult.

Yusoff Mohamed J.: The 2nd plaintiff's claim was settled before trial of this action and the remaining dispute is between the 1st plaintiff and the defendants.

The proprietor of the 1st plaintiff's company which owned a house in Kuching had put out the house for sale. The house and land was described as lot 1629 Block 195 Kuching North Land District. The 1st defendant was the owner of lot 1305 Seduan Land District at Sibu (Sibu land) comprising an area of 11.47 acres. The 2nd defendant is the husband of the 1st defendant.

On February 14, 1974 two brokers met the plaintiff. They wanted to buy his house and at the same time wanted to sell him a piece of land described to him as 'near the airport at Sibu'. The price was $75,000.

Next day, February 15, 1974, the brokers returned with a businessman named Siew who offered to buy the Sibu land for $94,000. After they left the plaintiff went to see the manager of Hock Thai Finance company who had telephoned him that the owner of the Sibu land wanted to sell it at $75,000 and that the owner was with him. The plaintiff met the 1st defendant there who expressed an interest to buy a house in Kuching and to pay for it from the proceeds from the sale of her land. The plaintiff inspected the title of the land (Exhibit P1A) which was kept by the Finance Company. Then he took the 1st defendant to inspect his house which the 1st defendant agreed to buy at $38,000. He then sent the 1st defendant back to the Finance Company.

On returning to his office the plaintiff instructed his solicitor to make a search on the title of the Sibu land.

That same afternoon the brokers and Mr. Siew met the plaintiff again. An agreement was made between the plaintiff and Mr. Siew that the latter would purchase the land at Sibu from the plaintiff at the price of $94,000 and the transfer was to be effected on Monday the 18th of February 1974.

The agreement is as follows:

"Kuching
15th February 1974

Received from Mr. Siew Meu Chiong of No. 15, Ramin Street, Sibu the sum of Dollars two thousand only ($2,000/-) being deposit for purchase of Lot 105 Seduan Land District 11.47 acres, Sibu.

The selling price is $94,000/- and it is agreed that the balance to be paid in full on transfer on Monday 18th February, 1974. It is also agreed that if the buyer did not or fail to come for the transfer then the said sum of deposit of $2,000/- will be forfeited to the seller.

In the event if the seller refused to transfer of the said Land, the seller will pay $4,000 as liquidated damages.

Sgd.

.....
Witness

WEI TAH CONSTRUCTION (B) SDN.
Sgd.

.....
Managing Director"

The following morning, February 16, 1974, the plaintiff went to the manager of Hock Thai Finance company's office again after he was informed that the 1st defendant was there. He took the 1st defendant to his solicitor's office and there, he instructed the solicitor to prepare the document of transfer of the Sibu land to him after, he said, the 1st defendant had assured him that the land was 'near the Sibu airport'. He also instructed the solicitor to prepare another document transferring his house to the 1st defendant. After that he sent the 1st defendant back to the Finance Company.

At 11.00 o'clock the same morning he was called by his solicitor to be in his office. When he went there he met the 1st defendant who his solicitor said, wanted to return to Sibu. At this time, the plaintiff alleged that the 1st defendant told him that the Sibu land was only 500 yards away from the airport. He said that he did not believe her assurance but he paid the 1st defendant $37,000 in cheque and also executed the transfer of his house to the 1st defendant in exchange for the Sibu land. The 1st defendant signed the document transferring the Sibu land to him.

A week later Mr. Siew telephoned the plaintiff from Simanggang but never appeared to take the transfer of the Sibu land. At the same time plaintiff sent his employee to inspect the Sibu land which was shown to him by the 2nd defendant. He discovered that the land was 8 to 9 miles away from the Sibu airport. Following this the plaintiff instructed his solicitor to repudiate the transfers of both the Sibu land and his house.

From this sequence of events it would not be difficult to determine at what stage of the negotiation the plaintiff decided to purchase the Sibu Land but the question is whether he acted on the alleged misrepresentation when he made that decision which induced him to buy the land.

Apparently the plaintiff negotiated with two sources to purchase the land. Firstly with the brokers and secondly with the 1st defendant and the manager of the Finance Company. However he decided to purchase the land when he entered into agreement with Mr. Siew that the latter would purchase it from him with some margin of profit for himself. Under cross-examination the plaintiff agreed that he was motivated by profit when he entered into negotiation with 1st defendant and when re-examined, he maintained that he had intended to acquire the Sibu land when this agreement was signed.

At this point of time, in the morning of February 15, 1974, the 1st defendant had not represented anything to him regarding the location of the land. His first meeting with the 1st defendant at the Finance Company's office confined to inspection of the land title, negotiation of its price and the price of his house for the purpose of exchange. The brokers had represented to him on the 14th of February 1974 that the Sibu land was near the airport. This representation cannot be attributed to the 1st defendant. There is no evidence to show that the 1st defendant was involved with the two brokers or that these brokers were sent by her.

In order to implicate the 1st defendant in his dealing with the brokers the plaintiff alleged that someone identifying himself as the husband of the 1st defendant telephoned him about the price of the Sibu land after the brokers had left him on February 14. There is however, no evidence adduced to identify the caller was in fact the 1st defendant's husband (2nd defendant). On the contrary, his employee (PW2) said that the 2nd defendant went to the plaintiff's office on February 14 to sell the Sibu land and this clearly contradicts the plaintiff's own evidence. The 2nd defendant in turn has shown by hotel and purchase receipts that he was in Simanggang and Lingga more than 100 miles away, between February 13 and 15, 1974 (Exhibits D1 & D2 A to C).

Having regard to these circumstances, in my view, there was no representation in any way made by the 1st or 2nd defendant which induced the plaintiff to purchase the Sibu land at that stage of the negotiation.

Even assuming that the plaintiff relied on the description of the land as 'near Sibu airport' which induced him to purchase it, which description is attributed to the 1st defendant, it is apparent from the evidence that he was not misled by that statement. The plaintiff had earlier instructed his solicitor to investigate the title and in consequence of this investigation the plaintiff was advised that the Sibu land was a good buy. It would therefore appear that the plaintiff rested his judgment on his solicitor's advice rather than from the 1st defendant.

In *Holmes* v. *Jones*[1] Griffith C.J. said:

"It appears to me to be common sense as well as law that, when a purchaser chooses to rely upon his own judgment or upon that of his agent, he cannot afterwards say that he relied upon a previous representation made by the vendor."

In this case it appears to me that the plaintiff trusted his own inquiries rather than the representation made by the 1st defendant — see *Redgrave* v. *Hurd*.[2]

Paragraph 4(c) of the statement of claim alleges that the plaintiff was induced by the representation that the land was "500 yards from the Sibu airport", when he had the exchange effected and the sum of $37,000 paid to the defendants. This representation was alleged to have been made by the 1st defendant at the plaintiff's solicitor's office when the documents of transfers exchanging the Sibu land and the plaintiff's house were effected. The 1st defendant denied having made the purported statement.

In my view, it is not likely that the 1st defendant made the statement alleged. It was not necessary. The plaintiff had already decided to buy the land long before the transfer documents were executed, on that Saturday morning, February 16, 1974. He had the advice of his solicitor and had instructed the solicitor to prepare the documents before meeting the 1st defendant on this occasion. He had earlier entered into agreement with Mr. Siew to transfer the land to him on Monday, February 18, 1974, failing which he would have to pay $2000 in damages and also to refund the deposit of $2000. The bargain would nett him a profit of $19,000. On these considerations, in my opinion, the plaintiff would execute the transfer documents with the 1st defendant irrespective of whatever representations made by the 1st defendant because he did not

intend to keep the land, for himself and did not have to rely on those representations. He was gullible and admitted to be profit-motivated.

Lastly and in the alternative, the plaintiff sought to avoid the contract on mistake or non disclosure of material facts. The defect which the plaintiff seeks to rely here is a patent defect of quality of the land he purchased. Patent defects are such as are discoverable by inspection and ordinary vigilance on the part of the purchaser and to quote *Halsbury's* Laws of England 3rd Ed. Vol. 34 page 212:

"the rule is caveat emptor; a purchaser should make inspection and inquiry as to that which he is proposing to buy. If he omits to ascertain whether the land is such as he desires to acquire, he cannot complain afterwards on discovering defects of which he would have been aware if he had taken ordinary steps to ascertain its physical condition; and, although as a general rule a vendor must deliver property corresponding to the description contained in the contract, yet an error in the particulars or description of the property in the contract is not a ground of objection if it is readily corrected on inspection."

It is very obvious in the present case that the plaintiff had chosen not to inspect the land before executing the transfer with the 1st defendant in view of his other considerations in making a quick profit and in this regard he cannot now complain on discovering the defects after his venture with Mr. Siew has failed.

In *Svanosio* v. *McNamara & Anor.*[3] it was said that:

"It may be possible in exceptional cases to obtain relief on the ground of common mistake after a contract for the sale of land has been completed. But the cases must be very rare. They are unlikely to go beyond cases where there has been a total failure of consideration."

In my judgment, this is not one of those rare cases where mistake can be pleaded successfully and certainly there has been no failure of consideration here. The plaintiff's claim must necessarily fail and is therefore dismissed.

Based on the same facts, the 1st defendant's counter-claim should succeed and it is ordered that the transfer of the house and land described as lot 1629 block 195 Kuching North Land District be effected in favour of the 1st defendant. There is no evidence advanced on purported damages sustained by the 1st defendant as house rent for the period claimed and in this event the prayers at paragraph (b) and (c) of the counter-claim fail.

The defendants will have the costs of this action.

Claim dismissed.

Solicitors: *Yong & Co.; Ee, Lim & Lin.*

Re MAT SHAH; *Ex Parte* RAGHBIR SINGH

[O.C.J. (Ajaib Singh J.) December 1, 1979]
[Seremban — In Bankruptcy No. 104 of 1978]

Bankruptcy — Calculation of interest not exceeding 8% — When moneylender can receive interest exceeding 8% — Moneylenders Ordinance 1951, s. 20(1) — Moneylenders Act 1927 (U.K.), s. 9(1) — Bankruptcy Act 1967, s. 5.

Moneylending — Scope of s. 20(1) of Moneylenders Ordinance 1951.

Bankruptcy Law — Bankruptcy petition and bankruptcy notice distinguished — Different interest rates chargeable.

The moneylender in the present case had obtained judgment against the debtor for $1,500 plus interest at 18% per annum and costs making a total of over $2,000. His bankruptcy notice which he subsequently served upon the debtor went unheeded. He then presented a bankruptcy petition against the debtor claiming the debt due to him with interest at 18% per annum which had been allowed to him in the judgment debt.

Held, dismissing the bankruptcy petition: (1) the calculation of interests at 18% was illegal for it contravened the provisions of section 20(1) of the Moneylenders Ordinance; if the interest had been calculated at the authorised rate of not more than 8% per annum then the total debt due to the moneylender would have been a little less than the minimum sum of $2,000 required to base a bankruptcy petition under the Bankruptcy Act 1967, section 5;

(2) a bankruptcy notice which a creditor may serve on a debtor under the Bankruptcy Act is not restricted as a bankruptcy petition is under section 20(1) of the Moneylenders Ordinance and section 5 of the Bankruptcy Act;

(3) although a moneylender is not allowed to calculate interest at more than 8% in his bankruptcy petition he has nevertheless the right to receive interest over and above the 8% to which he may be entitled but only after all the debts proved in the debtor's estate have been paid in full. This is so by virtue of the Moneylenders Ordinance, section 20(1).

Cases referred to:-

(1) *In re A Debtor* [1930] 2 Ch. 239.

(2) *In re A Debtor* [1937] Ch. 181.

CIVIL SUIT.

Gurdial Bakan Singh for the Judgment Creditor.

Cur. Adv. Vult.

Ajaib Singh J.: When a moneylender presents a bankruptcy petition against a debtor the interest on the debt due to him and which may be included in the petition is to be calculated at an annual rate not exceeding eight per cent by virtue of section 20(1) of the Moneylenders Ordinance 1951 which reads as follows: —

"Where a debt due to a moneylender in respect of a loan made by him after the commencement of this Ordinance includes interest, that interest shall, for the purposes of the provisions of the Bankruptcy Enactment of the Federated Malay States or any corresponding law in force in any other State relating to the presentation of a bankruptcy petition, voting at meetings, compositions and schemes of arrangement and dividend, be calculated at a rate not exceeding eight per centum per annum, but nothing in the foregoing provision shall prejudice the right of the creditor to receive out of the estate, after all the debts proved in the estate have been paid in full, any higher rate of interest to which he may be entitled."

In the present case the moneylender had obtained judgment against the debtor for the sum of $1,500 plus interest at the rate of eighteen per centum per annum and costs making a total of a little over $2,000. His bankruptcy notice which he subsequently served upon the debtor went unheeded. He then presented